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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

IGNACIO DE LA TORRE et al.,

Defendants and Appellants.

B175975

(Los Angeles County
Super. Ct. No. GA025107)

APPEAL from an order of the Superior Court of Los Angeles County,
Teri Schwartz, Judge. Affirmed.

Marilee Marshall & Associates, Marilee Marshall and Jennifer Peabody for
Defendants and Appellants.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney
General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D. Matthews
and Mary Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

Ignacio De La Torre and Juan De La Torre appeal from an order denying their petition for a writ of error *coram nobis* to vacate the judgment entered following their plea of no contest to assault with a deadly weapon. They contend the trial court abused its discretion by summarily denying the petition, which was based on newly discovered evidence. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Ignacio De La Torre and his brother Juan De La Torre were charged by criminal complaint with attempted murder and inflicting great bodily injury on Fermin Nuno during an attack on Nuno at the A-1 Pizza restaurant and bar in August 1995.

At the preliminary hearing in October 1995, Antonio De La Rosa, the owner of A-1 Pizza, and Detective Robert Klein, the investigating officer, testified for the People. No evidence was presented by the defense.

De La Rosa testified that Nuno was at the bar on the evening of August 5, 1995 and that Juan Carlos Flores and the De La Torre brothers arrived later. A fight erupted when Flores suddenly hit Nuno in the head, causing him to fall backward to the floor.¹ Fifteen to 20 people began beating Nuno. Ignacio De La Torre threw himself at Nuno, punching and kicking his face and torso. Juan De La Torre grabbed Nuno's head and repeatedly struck it against the floor. Nuno did not attempt to defend himself during the altercation, which lasted three to four minutes. Detective Klein testified that, according to his treating physicians, Nuno had suffered serious head injuries.

At the conclusion of the preliminary hearing, both Ignacio De La Torre and Juan De La Torre were held to answer on the attempted murder charge. After the information was filed, the De La Torre brothers entered a negotiated plea of no contest to one count of assault with a deadly weapon. They were each sentenced to four years in state prison on February 19, 1997.

¹ Flores was also prosecuted for his role in the attack on Nuno.

On April 22, 2004 the De La Torre brothers filed a petition for writ of error *coram nobis* on the ground of newly discovered evidence. In support of their petition they submitted the declarations of four individuals who asserted they had witnessed the fight at A-1 Pizza and that neither Ignacio De La Torre nor Juan De La Torre had struck or otherwise injured Nuno. Three of the witnesses had worked at A-1 Pizza in 1995. Each stated she was afraid to report what she had seen because De La Rosa had threatened to fire her if she came forward. In her declaration Irma Chavez stated that Nuno had been kicked by De La Rosa and that she eventually tried to call police, but De La Rosa had snatched the telephone from her hand and ripped the cord from the wall. Maria Miller stated in her declaration that she was “no longer employed by Mr. De La Rosa and am able and willing to tell the truth.” Maribel Lomeli similarly stated in her declaration that she is “no longer employed by De La Rosa and am able to tell the truth.”

The fourth declaration, from Frederico Becerra, stated he had witnessed the altercation while a patron at the bar and had seen the De La Torre brothers attempt to break up a fight between Nuno and another patron. Becerra did not see either brother harm Nuno. At some point De La Rosa grabbed Nuno and forcibly removed him from the bar. Becerra left before police arrived and was never questioned about what happened. Becerra came forward when he learned about “the severity and repercussions” of the altercation.

Neither Juan De La Torre nor Ignacio De La Torre submitted a personal declaration with the petition.

On April 22, 2004 the trial court summarily denied the petition, finding the De La Torre brothers “have not demonstrated that the facts alleged were not known to them at the time of their pleas.”

DISCUSSION

A petition for a writ of error *coram nobis*, the equivalent of a motion to vacate the judgment (*People v. Dubon* (2001) 90 Cal.App.4th 944, 950), lies to give relief to a petitioner who through fraud, coercion or excusable mistake was deprived of a fair trial on the merits. (*People v. Carty* (2003) 110 Cal.App.4th 1518, 1523.) “The writ of *coram nobis* is granted only when three requirements are met. (1) Petitioner must ‘show that some fact existed which, without any fault or negligence on his part, was not presented to the court at the trial on the merits, and which if presented would have prevented the rendition of the judgment.’ [Citations.] (2) Petitioner must also show that the ‘newly discovered evidence . . . [does not go] to the merits of issues tried; issues of fact, once adjudicated, even though incorrectly, cannot be reopened except on motion for new trial.’ [Citations.] This second requirement applies even though the evidence in question is not discovered until after the time for moving for a new trial has elapsed or the motion has been denied. [Citations.] (3) Petitioner ‘must show that the facts upon which he relies were not known to him and could not in the exercise of due diligence have been discovered by him at any time substantially earlier than the time of his motion for the writ. . . .’ [Citations.]” (*People v. Shipman* (1965) 62 Cal.2d 226, 230.)

It is the petitioner’s burden to establish by clear and convincing evidence that he or she was deprived of a substantial right by some extrinsic cause. (*People v. Tucker* (1957) 154 Cal.App.2d 359, 362.) Denial of a petition for writ of error *coram nobis* is generally appealable and is reviewed for abuse of discretion. (*People v. Dubon, supra*, 90 Cal.App.4th at p. 951.)

There was no abuse of discretion in this case. We agree with the trial court that the De La Torre brothers failed to establish the due diligence necessary for issuance of the writ. (See *People v. Shorts* (1948) 32 Cal.2d 502, 513 [timeliness of presentation of new facts must be pleaded with particularity].) Not only did the petition fail to demonstrate that the De La Torres had made any attempt to secure witnesses before entering their pleas in 1996, but it also failed to adequately explain their lengthy delay in

seeking *coram nobis* relief by affirmatively showing the new witnesses and their anticipated testimony could not have been discovered prior to 2004.

More fundamentally, the De La Torres' purported discovery that potentially favorable evidence had been concealed from them prior to entry of judgment is not an appropriate basis for relief by writ of *coram nobis*. "It is settled in California that, absent extrinsic fraud or duress, a judgment predicated on perjured testimony or entered because evidence was concealed or suppressed cannot be attacked by a petition for a writ of *coram nobis*. [Citations.]" (*Mendez v. Superior Court* (2001) 87 Cal.App.4th 791, 802; see *People v. Williams* (1965) 238 Cal.App.2d 585, 591-592 ["The second requirement of *Shipman* prohibits use of the writ to reopen an issue of fact once adjudicated on the ground of newly discovered evidence. [Citations.] The foregoing applies even though the newly discovered evidence is a confession by a fellow convict or another, that he and not the petitioner committed the offense. [Citations.]"].) The petition for writ of *coram nobis* was properly denied.

DISPOSITION

The order denying the petition is affirmed.

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PERLUSS, P. J.

We concur:

JOHNSON, J.

WOODS, J.